United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, May 6, 2021 **Hearing Room 5A**

2:00 PM

8:17-12213 Solid Landings Behavioral Health, Inc. **Chapter 11**

Adv#: 8:20-01010 Grobstein v. Degner

#34.00 CON'TD Hearing RE: Plaintiff's Motion for Partial Summary Judgment on First Claim for Relief

FR: 4/22/21

Docket 82

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

May 6, 2021

Partially grant the Motion. Grant partial summary adjudication on the first element for breach of fiduciary duty in Plaintiff's favor- that Defendant owed the fiduciary duty of care to Debtors as Debtor's president. Deny all other relief requested.

Basis for Tentative Ruling:

Solid Landings Behavioral Health, Inc. ("Solid Landings") filed a voluntary chapter 11 on June 1, 2017. An order authorizing joint administration with several related debtors, including Sure Haven, Inc.("Sure Haven"), was entered on June 7, 2017. The order confirming the related debtors' liquidation plan was entered March 22, 2018, and Howard Grobstein was appointed liquidating trustee ("Plaintiff").

On January 30, 2020, Plaintiff filed the within complaint alleging a single cause of action for breach of fiduciary duty against the defendant, Gerik M. Degner ("Defendant"). The order denying Defendant's motion to dismiss or transfer the complaint was entered April 14, 2020. Defendant filed his answer on April 21, 2020 demanding a jury trial. Defendant also filed a third-party complaint against Starr Indemnity & Liability Company ("Starr") on

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April 22, 2020, and Starr filed its answer on May 26, 2020. On January 21, 2021, the court entered its order granting Plaintiff's first motion for partial summary adjudication as to Defendant's 32nd affirmative defense, holding that the business judgment rule was not applicable to Defendant as a defense. Plaintiff now moves for partial summary judgment on his breach of fiduciary duty claim for relief ("Motion" and "Points and Authorities")[AP dkt. 82] and ("Reply")[AP dkt. 103]. Defendant opposes the Motion ("Opposition")[AP dkt. 96].

A. Legal standard

Under FRCP 56(a), made applicable herein by FRBP 7056, "[t]he The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine issue of material fact, and establishing that it is entitled to judgment as a matter of law as to those matters upon which it has the burden of proof. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. *Id*. at 324. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Id.* A factual dispute is genuine where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id*.

The court must view the evidence presented on the motion in the light most favorable to the opposing party. *Id*. "Therefore, at summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party: if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987)(internal citations omitted). In the absence of any disputed material facts, the inquiry shifts to whether the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Furthermore, where

intent is at issue, summary judgment is seldom granted. *See Provenz v. Miller*, 102 F.3d 1478, 1489 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 48 (1997).

B. Undisputed facts

Stephen Fennelly ("Fennelly"), Mark Shandrow ("Shandrow"), and Elizabeth Perry ("Perry")(collectively, "Owners") owned 99% of Sure Haven and 100% of the other four related debtors. Owners were the only directors of Solid Landings and Sure Haven (collectively, "Debtors"). Debtors provided 12-step treatment and alternative treatment programs for people suffering from substance abuse. Owners entered the substance abuse treatment business in approximately 2009, opening a sober living residence in Costa Mesa. Debtors expanded rapidly in 2014 and 2015 and peaked around September 2015. At that time, Debtors were operating in California, Nevada, and Texas and offered 550 beds, serving more than 3,000 clients annually, and employed approximately 1,200 employees. Plaintiff's Statement of Undisputed Facts ("UF") 1-3, 8 (It is unclear whether Defendant is disputing some of these facts because Defendant effectively tries to rewrite the UF in Defendant's Statement of Genuine Issues ("GI") without citation to any evidence. As such, to the extent any SUF is not "adequately controverted by citation to evidence filed in opposition to the [summary judgment] motion", such fact is deemed admitted under LBR 7056-1(f)).

Debtors began experiencing financial problems in the second half of 2015 after Debtors failed implement the infrastructure, such as specialized medical billing software, necessary for the expanded enterprise to operate effectively, litigation with Costa Mesa over regulations that severely restricted the use of property in Costa Mesa for substance abuse treatment services, and overextending themselves pursuing the development of large facilities in Long Beach and Santa Ana to replace the Costa Mesa facilities. UF 8, 10-11. Fennelly approached Defendant for assistance at that time.

Defendant, who had worked with Fennelly in investment banking in 2009, found Alpine Pacific Capital, LLC ("Alpine"), a private equity group. Debtors approached Alpine and Defendant to help Debtors obtain bridge financing since collections to alleviate cash flow issues. UF 4-5. In

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November 2015, Alpine helped Debtors obtain a $7.5 million line of credit from CapStar Bank ("CapStar") secured by substantially all of Debtors' assets. UF 9. Alpine also assisted Owners in their effort to sell the business with the help of Brentwood Capital Advisors, LLC ("Brentwood"), an investment bank. UF 12. These sale efforts were halted in December 2015 after an outside accounting firm could not complete its analysis of Debtors' revenue because Debtors' revenue and profit numbers were inflated and severely inaccurate. UF 14.

Around the end of 2015, Debtors began losing revenue for two primary reasons: (1) insurance companies stopped paying for substance abuse treatments and that revenue represented 95% of Debtors' revenue, and (2) Debtors' reduction in operation in an effort to cut expenses resulted in declining patient censuses and further reduced revenues. UF 10-11. In January 2016, Owners communicated with outside counsel about the possibility of a chapter 11 filing but no petition was filed. UF 16. Several months later, on April 15, 2016, Defendant became president of Debtors. UF 18. Owners hired him because they had asked Defendant to identify other possible sources of debt for Debtors and Defendant had told Owners that hiring him as president would facilitate lending for Debtors' financing. UF 18; Fennelly Decl., 4, ¶13.

Defendant served as president from April 15, 2016 through July 28, 2017. UF 19. During that time, Defendant managed Debtors' daily operations, at least in part (even though Defendant had no experience in the healthcare industry) and corporate finance duties. UF 19; GI 19. Defendant received daily emails informing him of Debtors' financial status and the patient census and Owners also received emails regarding the same. UF 20-21, 24, 42, 47, 54, 57-64; GI 20. Per the patient census reports, at Debtors' peak in 2015, Debtors had 350 patients, at the end of May 2016, Debtors had 175 patients, and by the end of May 2017, Debtors had 14 patients. UF 27. Defendant and Owners received financial reports report indicating that, as of May 31, 2016, Debtors owed approximately $2.9 million in accrued accounts payable, of which more than 40% (approximately $1.2 million) was more than 90 days past due, that Debtors were struggling to cover basic expenses, like insurance and payroll, and that funds were insufficient to spend on marketing which was necessary to attract new

patients. UF 7, 21-25. The May 2016 financials that Defendant received on July 12, 2016 also indicated that between February 2016 and May 2016, Debtors' revenue declined approximately 50% – from approximately $8 million in February to approximately $4 million in May and that the declining revenue had caused Debtors to begin incurring substantial losses, with Debtors losing $886,825 in May 2016. UF 21, 26. In May 2016, Owners and Defendant discussed ceasing operations. Fennelly Decl., Ex. 6. Defendant also knew that a term sheet to sell Debtors' Long Beach facility to Behavioral Property Partners ("BPP") had stalled due to BPP's failure to provide information about their funding. UF 32.

During Defendants' tenure as president, Debtors lost approximately $24.6 million and all of the related debtors lost $32.8 million. Fennelly Decl., Ex. 263. Defendant negotiated a Forbearance Agreement with CapStar on August 31, 2016 that nominally increased the credit limit but became due on October 15, 2016. UF 39. On that date, the balance owed to CapStar was $6,913,917.78. UF 51. The effort to sell Debtors' assets in Long Beach and Texas (and certain real estate assets of Debtors' affiliates) in 2016 was ultimately unsuccessful as well and the purported $8.5 million purchase price would, at best, only result in net proceeds of $4 million to Debtors. UF 56. The only assets Debtors ever sold to BPP were the real properties in which Debtors' Long Beach facilities were housed, which yielded net proceeds of $265,828.26. UF 65.

C. The court declines to rule on Defendant's procedural objections

Defendant raises two procedural arguments against the Motion. First, Defendant contends that the Motion (consisting of a 47 page "Motion" and 21 page "Memorandum of Points and Authorities") violates U.S. District Court Local Civil Rule 11-6 which sets the page length for briefs at 25 pages unless permitted by order of the court. *See also* LBR 1001-1(e)(1)("A matter not specifically covered by these Local Bankruptcy Rules *may be* determined, if possible, by parallel or analogy to the F.R.Civ.P., the FRBP, or the Local Civil Rules.")(emphasis added). Second, Defendant objects to Plaintiff's failure to produce all 238 exhibits filed in support of the Motion since Plaintiff did not supplement its initial disclosures under FRCP 26(a) in violation of FRCP 26(e). Accordingly, Defendant requests a continuance under FRCP 56(d)(2)

to allow Defendant the opportunity to review these newly produced exhibits and conduct additional discovery. *See* Opp'n, 7 and 12. Plaintiff counters that email exhibits were only "recently obtained" from Fennelly's counsel (without giving the actual date) by Plaintiff and in any event, Defendant was on notice since August 31, 2020 (when Plaintiff served his initial FRCP 26(a) disclosures to Defendant) that there were emails in Owners' possession but Defendant himself failed to conduct discovery on Owners. *See* Reply, 22-27. While the court notes that Plaintiff's initial FRCP 26 disclosures stated that "some of these emails" were in Plaintiff's possession and "that others" were in the possession of third parties, *see* Supp. Decl. of M. Rieder, Ex. 14, p. 8, because the court will largely deny the Motion on the merits in Defendants' favor as discussed below, these two procedural objections will have no bearing on the outcome so the court declines to rule on Defendants' procedural objections.

Defendants' arguments regarding Plaintiff's lack of admissible evidence, *see* Opp'n, 13-15, repeat the arguments raised by Defendant in his 251 total evidentiary objections. As such, the court need not address these evidentiary arguments again here since the court's rulings on the evidentiary objections will do so.

D. Plaintiff has failed to carry his burden to demonstrate the absence of material facts and that Plaintiff is entitled to summary judgment as a matter of law as to the entirety of the claim for relief

As Debtors are both California corporations, California law is applicable. *See, e.g., Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1527 (9th Cir. 1985) ("Claims involving 'internal affairs' of corporations, such as the breach of fiduciary duties, are subject to the laws of the state of incorporation."). Under California law, "[t]he elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 483 (1998); *see* P. & A., 2. The plaintiff has the initial burden of proving not only the existence of a fiduciary duty, but also the failure to perform it. *LaMonte v. Sanwa Bank California,* 45 Cal. App. 4th 509, 517 (1996). Turning to these elements individually:

1. Defendant had a fiduciary duty to Debtors

Under California law, "officers of corporations who participate in the management of the corporation are considered fiduciaries as a matter of law" and one of those fiduciary duties is the duty of care. *See L.A. Mem'l Coliseum Com. v. Insomniac, Inc.*, 233 Cal. App. 4th 803, 834 (2015); *GAB Bus. Servs. v. Lindsey & Newsom Claim Servs.*, 83 Cal. App. 4th 409, 420-21 (2000) ("An officer who participates in management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law."). The fiduciary duties owed by the officer of a California corporation include the duty of care. *See, e.g., FDIC v. McSweeney*, 976 F.2d 532, 538 (9th Cir. 1992) ("Under California statutory and common law, shareholders and corporations have an established right to sue corporate directors and officers for negligent breach of the duty of care."). The duty of care requires corporate officers to exercise "reasonable care, diligence, and skill in their work." *In re Heritage Bond Litig.*, 2004 U.S. Dist. LEXIS 15387, at *13 (C.D. Cal. Jun. 28, 2004); Mot., P. & A., 3-4.

In this case, because Defendant served as president of Debtors from April 14, 2016 to July 28, 2017, *see* P. & A., 3-4, UF 19; GI 19, and managed (at least in part) the daily operations of Debtors, *see*, UF 67; GI 67, Defendant owed a fiduciary duty to Debtors as a matter of law.

2. There are questions of material fact over whether Defendant breached his fiduciary duty to Debtors

Plaintiff argues that Defendant breached his duty of care to Debtors by failing to cease Debtors' operations or file for bankruptcy no later than July 15, 2016. By that date, Defendant purportedly knew with absolute certainty, from the financial reports he received about Debtors and communications with Owners, that Debtors' downward spiral could not be stopped and continuing to operate Debtor would only cause further losses. Defendant nonetheless continued to operate Debtors after July 15, 2016 for almost an entire additional year, losing millions per month, after any officer exercising reasonable care would have ceased operations, and Defendant ultimately caused Debtors to lose $20,552,236.43 during that time. *See* P. & A., 4-18.

Defendant counters that Owners were not disinterested directors but rather officers themselves of Debtors (Fennelly as CEO, Shandrow as Chief Revenue Officer, and Perry as Chief Culture Officer) who supervised Defendant, made strategic decisions on behalf of Debtors, and performed day-to-day management of Debtors themselves, which is evidenced by the fact that Owners were copied on the emails regarding Debtors' finances. Opp'n, 16-17; Degner Decl., 2, ¶ 2; B. Dully Decl., 2, ¶ 7-8 (reporting directly to Fennelly); S. Halberstadt Decl., 2-3, ¶ 10 (summarizing emails in which Owners are described as officers and/or participating in Debtors' operations). As officers of Debtors, Defendant argues that Owners themselves beached their fiduciary duties, not Defendant, because Owners, not Defendant, ultimately had the authority to decide whether to cease operations or file for bankruptcy (which they failed to do in January 2016 when they discussed filing for chapter 11 months before Defendant even was hired as president). *See* Opp'n, 18-20.

Viewing the evidence in the light most favorable to the non-moving party, Defendant, Plaintiff has failed to carry his burden to demonstrate that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. First, that Owners served as officers of Debtors is unrefuted. Second, the scope of Owners involvement in Debtor's operations as officers remains disputed. And while Plaintiff argues that Owners were solely reliant on Defendant for deciding whether to continue Debtors' operations, this argument is undermined by the undisputed facts that Fennelly himself testified that Defendant was only hired a president to lend further credibility to Defendant's efforts to obtain debt financing for Debtors (or "facilitate lending" as Defendant described it, Fennelly Decl., 4, ¶13) so the scope of his duties were to be limited to the "finance department," Owners themselves had successfully operated Debtors for several years before 2015 and Defendant's appointment, and Fennelly appears to have remained active in Debtors' affairs even during his leave of absence. *See* UF 8, 18; Degner Decl., Ex. L (texts between S. Fennelly and Defendant discussing Debtors' business). In other words, viewing the evidence in the light most favorable to Defendant, and drawing all reasonable inferences in favor of Defendant, it is unlikely that Owners would have left the day-to-day operational management of Debtors solely to Defendant, with no input from Owners, when at least

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Fennelly knew that Defendant had no experience in operations or the healthcare industry. *See* UF 4, 6. Plaintiff's arguments is further undermined that Owners themselves demonstrated an intent to operate notwithstanding the dire financial condition of Debtors in January 2016 when Owners themselves refused to file for bankruptcy even after insurance payments constituting a significant portion of Debtors' revenue suddenly stopped in late 2015, Debtors' were in litigation with Costa Mesa, and Debtors overextended attempting to develop larger treatment facilities. *See* UF 8, 10, 16. Stated otherwise, Debtors were already in a financial death spiral when Defendant assumed the position of president of Debtors and factual issues abound as whether Defendant pursued a course of action (lack of action) that rose to the level of breach of his fiduciary duty.

Plaintiff has also failed to show that Defendant breached his fiduciary duties when, again viewing the evidence in the light most favorable to Defendant, it appears that there is material dispute as to whether Defendant was the only individual that wanted to continue operating Debtors after July 15, 2016 as the Motion argues. It appears that Owners, or at least Fennelly as CEO, wanted to continue operating past July 15, 2016. Exhibit J to Defendant's declaration is the engagement letter between Solid Landings and Brentwood, signed by Fennelly and dated July 7, 2016, confirming Brentwood's engagement for a possible sale of Debtors' Texas and Nevada assets, but no mention of Debtors' California assets is included. Plaintiff's attempts to paint Defendant as the only individual who wanted to pursue the ill-fated 2016 sale is therefore undermined by this engagement letter signed by Debtors' CEO only 8 days before the July 15, 2016 date (the date Plaintiff argues Defendant should have known to cease operations or file for bankruptcy). And even if Defendant had wanted to cease operations or file for bankruptcy, given Owner's intent to continue operating at Debtors' business in California (as evidenced by their refusal to file for bankruptcy in January 2016, May 2016, and the Brentwood engagement letter signed July 8, 2016), that Defendant as president could overrule the CEO who wanted to try to continue efforts to sell Debtor's assets on July 8, 2016. This lends support to Defendant's argument that Owners retained "ultimate control of the Debtors' operations and strategic decision making." *See* Opp'n, 5.

Plaintiff's reliance on Defendant's past testimony for the position that

Defendant has admitted that he was solely responsible for Debtors' daily operations is unpersuasive because Defendant in that testimony did not state that Owners had no role in Debtors' daily operations whatsoever. *See* Reply, 11-13. Again viewing the evidence in the light most favorable to Defendant, that past testimony can be construed as Defendant admitting that he played a major role (but not sole authority) in Debtors' daily operations. And to the extent that he took over Fennelly's operational duties during Fennelly's leave of absence, Defendant makes no mention of taking over the duties of the other two Owners in that past testimony. *See e.g.*, Degner Decl. [dkt. 66], 7, ¶ 24 ("In that role, *in conjunction with the Debtors' other remaining directors, Perry and Shandrow*, I prepared the strategic plans to keep the Debtors functioning and, potentially saving them.) (emphasis added).

Finally, in his declaration, Defendant testifies about his strategic plan for the company in terms of streamlining expenses and obtaining favorable financing, the actions he took to do so, and the challenges he faced. See, e.g., Degner Decl at ¶¶ 16-20, 22-25, 29. Viewing the facts in a light most favorable to Defendant, there are material issues of fact as whether Defendant's efforts constitute a breach of his fiduciary duty to Debtors.

3. There are questions of material fact over whether Defendant's breach, if any, caused the damages allegedly suffered by Debtors

Plaintiff argues that Defendant alone caused Debtors to continue operating past July 15, 2016 and as such, Defendant should be liable for the damages in an amount equal to the losses suffered by Debtors during that time. Plaintiff therefore seeks damages in the total amount of $20,552,236.43 plus 7% interest on the amounts awarded against Defendant with the interest on the amount awarded for each month running from the end of that month through the date on which final judgment is entered. *See* P. & A., 18-20; SUF 70 (while Defendant disputes the amounts, Defendant has offered no opposing evidence, *see* SGI 70).

Under California law, a fiduciary who breaches his duty of care is liable for damages in "the amount which will compensate for all the detriment

proximately caused thereby, whether it could have been anticipated or not." *See* Cal. Civ. Code § 3333 ("For the breach of an obligation not arising from contract, the measure of damages…is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."); *Michelson v. Hamada*, 29 Cal. App. 4th 1566, 1584 (1994)(holding the fiduciary liable for estimated income lost as a result of the fiduciary's improper management of a business); *Smith v. Arthur Andersen Ltd. Liab. P'ship*, 421 F.3d 989, 1004 (9th Cir. 2005)(agreeing "that the complaint states a cognizable harm to Boston Chicken when it alleges that the defendants 'prolonged' the firm's existence, causing it to expend corporate assets that would not have been spent 'if the corporation [had been] dissolved in a timely manner, rather than kept afloat with spurious debt.'"). "Although causation is a question of fact, it may be decided as a matter of law if, under undisputed facts, reasonable minds could not differ." *In re Heritage Bond Litig.*, 2004 U.S. Dist. LEXIS 15387, at *24 (C.D. Cal. June 28, 2004).

In opposition, Defendant raises several arguments. First, Defendant argues that under California Civil Code § 1431.2(a), when there are multiple tortfeasors, the damages must be allocated between the tortfeasors. *See* Opp'n, 21. This argument is unpersuasive because, as explained by Plaintiff, the plain language of Civil Code § 1431.2 requires "the application of comparative fault only to non-economic damages in personal injury, property damage and wrongful death cases' and not for claims for economic damages, such as breach of fiduciary duty claims. *See* Reply, 15-19. Civil Code § 1431.2(a), states…"*In any action for personal injury, property damage, or wrongful death*, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint." (emphasis added). Defendant's own cited legal authority supports Plaintiff's position. *See Dafonte v. Up-Right, Inc.*, 2 Cal. 4th 593, 601 (1992)("Section 1431.2 declares plainly and clearly that in tort suits for personal harm or property damage, no 'defendant' shall have 'joint' liability for 'non-economic' damages, and 'each defendant' shall be liable 'only' for those 'non-economic' damages directly attributable to his or her own 'percentage of fault.'"); *Evangelatos v. Superior Ct.*, 44 Cal. 3d 1188, 1239 (1988)("Second, it is well to recall exactly what Proposition 51 provides. It repeals the joint and several rule only as applied to noneconomic damages, i.e. pain and suffering,

emotional distress, loss of consortium and the like. (Civ. Code, § 1431.2, subd. (b)(2).)"); *Pfeifer v. John Crane, Inc.*, 220 Cal. App. 4th 1270, 1318 (2013)("Under Civil Code section 1431.2, JCI's liability for noneconomic damages is limited by its share of comparative fault."); *Vollaro v. Lispi*, 224 Cal. App. 4th 93, 99 (2014)("…Proposition 51…abolished joint and several liability for noneconomic damages in personal injury cases… Proposition 51, which amended Civil Code section 1431 and added Civil Code sections 1431.1 through 1431.5…").

Second, Defendant contends that Owners are solely responsible for any damages sustained by the Debtors after January 2016 (or May 2016) because their failure to file for bankruptcy then caused Debtors to continue operating through May 31, 2017, and Owners were also Debtors' corporate officers so they also fiduciary duties to Debtors. *See* Opp'n, 21-22. Viewing the evidence in the light most favorable to Defendant, this position raises a material factual dispute because it raises the issue of whether Defendant's breach, if any, was the proximate cause Plaintiff's damages. *See* Civ. Code § 3333 ("For the breach of an obligation not arising from contract, the measure of damages…is the amount which will compensate for all the detriment *proximately caused* thereby, whether it could have been anticipated or not." (emphasis added). "[T]he proper test for determining actual cause is the 'substantial factor' test, under which the defendant's conduct will be regarded as an actual cause of the plaintiff's harm if it was a substantial factor in bringing about the harm." *Heritage Bond Litig., supra*, at 25. Based on Plaintiff's own undisputed facts, Debtors were already in a "financial death spiral" at the end of 2015 (months before Defendant was hired as president) because insurance payments constituting a significant portion of Debtors' revenue suddenly stopped in late 2015, Debtors' were in litigation with Costa Mesa, and Debtors overextended attempting to develop larger treatment facilities. *See* UF 8, 10, 16. And as discussed above, Owners were also corporate officers of Debtors during 2015 who themselves owed fiduciary duties to Debtors. As a result, a dispute remains over material facts since reasonable minds could disagree over whether Defendant's breach, if any, was a substantial factor in bring about Debtors' damages or whether Debtors were already in a "financial death spiral" and contemplating bankruptcy prior to Defendant's hiring as president.

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CONT... Solid Landings Behavioral Health, Inc. **Chapter 11**

Plaintiff's reliance on California Corporations Code § 309 to argue that Owners cannot be liable for damages because they enjoy statutory immunity under the business judgment rule ignores the undisputed fact that Owners were also officers of Debtors and as this court has previously ruled, the business judgment rule is applicable to directors but not corporate officers. *See* Reply, 20-21. Thus, the scope of Owners' actions, whether as directors or officers, also remains a disputed material fact affecting not only the second element of whether Defendant breach his fiduciary duty, but also whether such breach, if any, was the proximate cause of Debtors' damages.

Conclusion

Under California law, "[t]he elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." *City of Atascadero, supra,* at 483. Plaintiff has carried his burden to demonstrate that there is no genuine dispute as to any material fact regarding the existence of a fiduciary duty, and that Plaintiff is entitled to partial summary adjudication on this first element. But because genuine disputes remain as to material facts regarding the second and third element, Plaintiff has not carried his burden under FRCP 56(a) as to these last two elements.

EVIDENTIARY OBJECTIONS

Defendant's Evidentiary Objectons to Declaration of Monica Reider

Objection #	Ruling
1 - Exh. 3	Admitted for the purpose of showing the document attached to Proof of Claim #77, not the truth of its contents
2	Sustained
3 - 8	Overruled

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CONT... Solid Landings Behavioral Health, Inc. **Chapter 11**

Defendant's Evidentiary Objections to Declaration of Stephen Fennelly

Objection #	Ruling
1	Overruled
2	Overruled
3	Overruled
4 - 7	Sustained.
8	Admitted as received by Declarant but not for truth of content
9	Admitted as received by Declarant but not for truth of content
10	Overruled
11	Sustained

As to the remainder of the objections re emails, emails sent by third parties to other third parties (not including Mr. Fennelly) are Sustained, emails sent by third parties (including to Mr. Fennelly) are admitted as emails received but not for the truth of content, emails sent by Mr. Degner are Overruled, and emails sent by Mr. Fennelly are Overruled.

Party Information

Debtor(s):

Solid Landings Behavioral Health, Represented By

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, May 6, 2021 **Hearing Room 5A**

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CONT... Solid Landings Behavioral Health, Inc. **Chapter 11**

David L. Neale
Juliet Y Oh
Jeffrey S Kwong
David M Samuels

Defendant(s):

Gerik M. Degner — Represented By
Ismail Amin

Plaintiff(s):

Howard B Grobstein — Represented By
Rodger M. Landau
Monica Rieder

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8:19-13858 Bruce Elieff **Chapter 7**
Adv#: 8:20-01161 Kurtin v. Elieff

#35.00 Hearing RE: Plaintiff's Motion for Summary Judgment or Partial Summary Judgment

Docket 10
***** VACATED *** REASON: CONTINUED TO 6/17/2021 AT 2:00 P.M., PER ORDER ENTERED 4/2/2021 (XX)**

Courtroom Deputy:

CONTINUED: Hearing Continued to 6/17/2021 at 2:00 pm, Per Order Entered 4/2/2021 (XX) - am/td (4/14/2021)

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Bruce Elieff	Represented By Lisa Nelson Robert P Goe

Defendant(s):

Bruce Elieff	Represented By Robert P Goe

Plaintiff(s):

Todd Kurtin	Represented By Lewis R Landau

Trustee(s):

Howard M Ehrenberg (TR)	Represented By Alan G Tippie Daniel A Lev Sean A OKeefe Claire K Wu

United States Bankruptcy Court
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CONT... Bruce Elieff **Chapter 7**